Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

From: Lawrence T. Woodlock, Senior Commission Counsel
Luisa Menchaca, General Counsel

Subject: Combined Expenditures by Political Party Committees on Federal and State or Local Elections: Proposed Regulation 18530.3.

Date: April 26, 2005

Executive Summary

Staff proposes a new regulation codifying several rules on the application of contribution limits, allocation of contributions and expenditures, and the reporting of campaign receipts and expenditures. The proposed rules have two features in common; they apply only to California political party committees, and they answer questions that have arisen over the past year on the often complex interaction between the state and federal laws governing these committees.

The new regulation would:

(1) Affirm that the contribution limit applied at Government Code section 85303(b) of the Political Reform Act (the "Act")[1] to political party committees includes contributions to *all* of their non-federal accounts, when the contributions benefit state candidates;

(2) Codify the advice given in a recent advice letter to the effect that, when a reimbursable federal expenditure also benefits state or local candidates or ballot measures, any un-reimbursed benefit to these candidates or measures is treated as a transfer of federal contributions to the state or local party committee;

(3) Provide a formula allocating such expenditures to contributors to the federal committee, which determines the state or local committee's reporting obligations under the Act; and

(4) Provide a more convenient but potentially less accurate option for allocating expenditures which do not benefit identifiable state or local candidates or ballot measures.

Staff held a well-attended interested persons' meeting on these questions in January 2005, which was most helpful in outlining the challenges faced by political party committees in the conduct of operations governed by two distinct, but sometimes interacting bodies of law. Pre-notice discussion of these proposed rules should be equally valuable.

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[1] All references to the Political Reform Act are to Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, California Code of Regulations.

Background

California political party committees are defined by the Act at section 85205:

> "'Political party' committee means the state central committee or county central committee of an organization that meets the requirements for recognition as a political party pursuant to Section 5100 of the Elections Code."

These committees typically maintain from two to four bank accounts, registered as committees in their own right under state or federal law, depending on their sphere of activity. Thus a county central committee may receive and direct contributions into a "federal account," subject to the source and amount limitations and the reporting requirements of the Federal Election Campaign Act ("FECA"), which regulates funds used in federal political activities. The same committee may also receive and direct contributions into a "non-federal account," subject to the limits and reporting requirements of the Act, which regulate funds used in state and local activities. In addition, federal law permits political party committees to establish and maintain "Levin fund" and "allocation" accounts, to collect and disburse funds used for a mix of federal and state or local activities. (See, generally, the *Boling* Advice Letter, No. A-04-212, Attachment A.)

The rules governing activities by California political party committees are well established insofar as they concern only state or local activities. But when these committees engage in activities regulated in part by our own Act, and in part by the FECA, the interplay between these two bodies of law is not always clearly outlined in federal or Commission regulations. Late last year Commission staff issued the *Boling* Advice Letter to address one such problem, and at roughly the same time staff began fielding questions on state law treatment of "Levin" funds, a then-new classification created by Congress in the Bipartisan Campaign Reform Act ("BCRA"). Under BCRA, Levin funds may be used by political party committees in certain federal *and* state or local activities, subject to state law. Congress gave detailed explanations for the use of such funds in federal activities, but left it to the states to integrate and regulate the use of such funds within their existing legal structures.

Staff believes that it would be useful to political party committees and their treasurers if the Commission were to adopt a new regulation answering certain discrete questions that have recently arisen regarding specific interactions of federal and state law. The regulation would not involve a systematic restatement of applicable contribution limits and reporting obligations, but would address limited circumstances where there is now some uncertainty regarding the proper application of existing state law.

A summary of the *Boling* advice letter, and a description of how state and federal law interact in the use of Levin funds, will provide the Commission with essential background for staff's proposed regulation.

A. The *Boling* Advice Letter

In September 2004 April Boling sought advice from Commission staff in her capacity as treasurer of the San Diego County Republican Central Committee ("the SDCRCC"), a single entity controlling three bank accounts. One account was used to support or oppose federal candidates, and was registered as a federal recipient committee. A California general purpose committee managed the remaining two bank accounts; one to support or oppose state candidates and committees, and the second to support or oppose other candidates or issues.

Shortly before writing, the SDCRCC printed an advertisement urging Republicans to vote in the upcoming election, and providing them with a list of candidates and measures supported by the committee; the advertisement contained recommendations relating to federal as well as non-federal candidates. Federal law required that payment for this particular advertisement be made initially from federal funds, but permitted the federal account to be reimbursed from a state account to reflect the portion of the advertisement devoted to non-federal candidates and issues. However, federal law permitted a maximum reimbursement of 64 percent of the total cost, while the SDCRCC found that the true benefit to state candidates and issues amounted to 80 percent of the total cost. Because federal law prevented the state committee from paying the federal committee the full value (to the state committee) of the advertisement, the federal committee had effectively subsidized portions of the advertisement featuring state candidates and issues.

In the *Boling* letter, staff reconciled the federal reimbursement provision with the Act's general requirement that all state committee income and disbursements be reported, by advising that the SDCRCC treat the federal committee's "subsidy" as a contribution from the federal to the state committee, in the amount of 16 percent of the cost of the advertisement. As required in such cases, the contribution would be allocated to contributors to the federal committee, the individual contributions being reported with the committee itself identified as an intermediary.

The problem highlighted in this letter is a recurrent one. To protect a federal interest in limiting the influx of non-federal funds into federal election activities, federal law governing mixed federal and state spending often establishes a presumption that expenditures attributable to federal activities will *not* be less than a certain percentage of the whole. When reasonable accounting methods indicate that the federal presumption overstates the federal component in particular cases, state committee accounts can only be balanced by quantifying the difference between presumption and reality, and providing some means for state committees to report that difference. The *Boling* letter made it possible for the SCDRCC to satisfy its state reporting obligation in that particular case, while demonstrating the need for a regulation that other similarly-situated committees might consult in the future.

B. Levin Funds

One of Congress's principal goals in passing BCRA was to limit the role of "soft money" in federal elections.[2] A legislative compromise, the "Levin Amendment," attempted to re-affirm the traditional role of "soft money" by permitting contributions up to $10,000 per person per year to every federal political party committee, subject to strict limits on the usage of "Levin funds," as described at 11 CFR part 300 and summarized below.

State and local political party committees that have receipts or make disbursements for "federal election activities" (as defined in FECA) may create up to four types of accounts; (1) a *federal account* for deposit of funds raised in compliance with FECA; (2) a *non-federal account* for deposit of funds governed entirely by state law; (3) an *allocation account* from which payments are made which may be allocated to both state and federal uses; (4) a *Levin account*, for deposit of funds that comply with some of the limits and prohibitions of FECA, and which are also governed by state law. This section focuses on the rules governing Levin funds.

Levin funds may only be spent by the committee that raises them, and only on certain activities. The general rule is that state and local party committees must use federal funds to make expenditures and disbursements for any federal election activity. However, they may use Levin funds (which are non-federal) to pay for voter registration activity during the 120 days prior to a regularly scheduled federal election, and generic campaign activity, voter identification, get-out-the-vote drives run in connection with an election in which a federal candidate appears on the ballot. These are uses to which "soft money" was traditionally directed in the federal system.

Expenditures on federal election activities totaling more than $5,000 per annum must be paid entirely from a committee's federal account, or allocated between its federal and Levin accounts under formulas based on the candidates appearing on the federal ballot, which dictate a minimum federal allocation that serves as a "floor" that prevents under-estimation of federal expenditures. The rules are as follows:

(1) If a presidential candidate, but no senate candidate appears on the ballot, then at least 28 percent of any mixed federal-state expenditure must be allocated to the federal account;

(2) If both a presidential and a senatorial candidate appear on the ballot, then at least 36 percent of the expenditure must be allocated to the federal account;

(3) If a senate candidate, but no presidential candidate appears on the ballot, then at least 21 percent of the expenses must be allocated to the federal account;

[2] "Soft money" refers to funds that could be donated to political parties without limit, ostensibly for use in traditional get-out-the-vote and other generic party-building activities, which nonetheless came to be used during the 1990s overtly to fund federal election campaigns. Contributions intended for use in election campaigns ("hard money") were subject to strict limits whose utility was compromised by the surge in "soft money" campaigns.

(4) If neither presidential nor senate candidates appears on the ballot, the minimum federal allocation is 15 percent.

Levin funds may *not* be used to pay for any part of a federal election activity that refers to a clearly identified federal candidate, or for any television or radio communication, unless the communication refers solely to a clearly-identified state or local candidate. Levin funds also may not be used to pay any person who devotes more than 25% of compensated time in connection with a federal election. It should be noted that Levin funds may be used for communications, including television and radio broadcasts, which refer to clearly identified *state* candidates.

Each state and local party committee has a separate Levin fund contribution limit of $10,000 per person per annum. Levin funds must be raised and spent by the committee that maintains the particular account. Transfers and joint fundraisers are prohibited. Generally, fundraising costs may not be allocated, and no non-federal funds may be used to pay direct fundraising costs; non-federal and Levin funds must be raised using non-federal or Levin funds.

A federal committee must file monthly reports of all receipts and disbursements of federal funds for federal election activities, including the federal portion of allocated funds. As noted above, the FECA establishes minimum percentages that must be reported as spent on federal election activities. The reporting party may, of course, allocate and report higher percentages when appropriate, and there is no penalty for over-allocation to the federal side of the ledger. The federal goal is to eliminate from federal elections the influence of money raised outside federal source and amount limitations. This goal is served equally well by accurate allocation and by over-allocation, which indeed is sometimes *required* by minimum allocation formulas.

Proposed Regulation 18530.3

Staff's proposed regulation (Attachment B) clarifies and codifies what staff believes to be permissible and desirable rules integrating state and federal law governing political party committees as they engage in mixed state and federal activities. The regulation addresses the specific problems identified in the *Boling* Advice Letter and the anticipated use of Levin funds by political party committees. What follows is a commentary on the provisions contained in each of the four subdivisions of proposed regulation 18530.3.

Subdivision (a) opens by generally asserting the Act's jurisdiction over all contributions and expenditures of a political party committee which are not within the exclusive jurisdiction of federal law. This assertion should be uncontroversial but for the possible objection that, since Levin accounts were created by federal law to serve an important federal interest – restricting the use of "soft money" in the federal system – the use of Levin funds should not be reportable or subject to limits under state law. However, federal law makes it clear that Levin funds must be raised and spent in compliance with federal *and* state law, and in particular federal law provides

that Levin funds are subject to state contribution limits. (See 11 CFR 300.31.) Subdivision (a) therefore provides that contributions to a Levin account (insofar as those contributions are intended to support or oppose candidates for elective state office) are counted against the annual contribution limit to political party committees, currently set at $27,900. (Section 85303(b); regulation 18545(a)(8).)

Subdivision (b) effectively codifies the advice given in the *Boling* Advice Letter. This subdivision provides that when a reimbursable federal expenditure also benefits state or local candidates or ballot measures, the un-reimbursed value is treated as a transfer of federal contributions to the state committee. The last sentence emphasizes that the determination of value to federal and state candidates must have a basis in fact, and cannot rest on an assumption that the minimum percentage allocated in all cases to federal candidates establishes the actual value to state or local candidates or measures.

Subdivision (c) codifies the contribution allocation formula employed in the *Boling* Advice Letter. This accounting method requires a "look back" that can extend to nearly two years, to establish a pool of contributors to whom a proportionate share of the contributions at issue will be attributed. This means of allocating contributions has proven convenient in the past for multi-purpose organizations like political party committees, and was selected for that reason. Other methods are possible, such as a "Last In, First Out" – "First in, First Out" ("LIFO/FIFO") system. Staff believes, however, that there should be some limit on how far a committee might look back in time for contributors for allocation purposes, to ensure attribution to persons who are still part of an active donor pool. In addition, subdivision (c) provides that where allocation results in an over-the-limit contribution, that allocation will not result in a violation by the contributor for purposes of section 85303(c), unless the contributor originally made the contribution for state or local activity. This will ensure that there is no inadvertent violation by a contributor for making a contribution merely as a result of an allocation by the political party committee.

Subdivision (d) provides for a different allocation rule than the one provided at subdivision (b) for apportioning expenditures as between federal and state or local accounts. Subdivision (b) requires that a political party committee calculate the value of expenditures benefiting state or local candidates or measures independently from any value that may be assigned to the federal candidate by federal law, to ensure that potential overestimates built into federal "minimum percentage" rules do not result in systematic underestimation of the value of expenditures benefiting state or local candidates or measures.

Subdivision (d), on the other hand, applies to "party-building" activities. It provides that expenditures *not* benefiting particular, identifiable candidates or measures may be apportioned by "any reasonable accounting method." Staff anticipates that political party committees could often invoke this subdivision to apportion true "soft money" expenditures by straightforward application of the federal formula, simplifying the calculation. The potential cost would be underestimation of the real state/local benefit of some expenditures, but staff believes that this

loss of precision may be acceptable in a rule that affects only the reporting of true "party-building" expenditures, a class of activity where it is in any case somewhat arbitrary to posit separate, quantifiable effects on federal and state arms of the same political party.

Staff recommends that the Commission approve regulation 18530.3 for adoption, with any modifications the Commission may deem appropriate after pre-notice discussion.

Attachment A – *Boling* Advice Letter, No. A-04-212
Attachment B – Proposed Regulation 18530.3